

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM WISE MOCK,

Defendant.

NO. CR-02-102-RHW
CV-05-067-RHW

**ORDER DISMISSING PETITION
TO VACATE, SET ASIDE, OR
CORRECT SENTENCE BY A
PERSON IN FEDERAL
CUSTODY**

Before the Court is Defendant's 28 U.S.C. § 2255 Petition to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Ct. Recs. 73, 74 & 75). Defendant is a federal prisoner proceeding *pro se*. Pursuant to Rule 4(b) of the Rules–Section 2255 Proceedings, the Court may dismiss a § 2255 motion if it “plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief.” In accord with Rule 4(b), the Court dismisses Defendant's Petition to Vacate, Set Aside, or Correct Sentence.

PROCEDURAL HISTORY

On March 2, 2005, Defendant filed his original 28 U.S.C. § 2255 motion, which he characterized as a “Request for Re-Sentence.” (Ct. Rec. 60). On April 27, 2005, the Court entered a warning, stating that it intended to characterize Defendant's motion as a 28 U.S.C. § 2255 motion, and granted Defendant an

**ORDER DISMISSING PETITION TO VACATE, SET ASIDE, OR
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1 opportunity to withdraw or amend the motion to include all his § 2255 claims. (Ct.
2 Rec. 61). In his response (Ct. Rec. 62), Defendant failed to amend or withdraw his
3 motion, triggering the Court to grant him an extension of time to withdraw or
4 amend his request for re-sentencing. (Ct. Rec. 63). Defendant then withdrew his §
5 2255 request for re-sentencing and asked for leave to amend. (Ct. Rec. 65). The
6 Court then granted him leave to withdraw or amend within the restrictions
7 regarding relation back and equitable tolling, by September 26, 2005 (Ct. Rec. 66).
8 This date was extended by the Court to December 27, 2005 (Ct. Rec. 72).

9
10 Before the Court are Mr. Defendant's Amended Petitions to Vacate, Set
11 Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §
12 2255. (Ct. Recs. 73, 74 & 75). These § 2255 motions, filed on January 27, 2006,
13 and March 23, 2006, were not filed within the one (1) year period of limitation that
14 began to run ninety (90) days after the time for filing a certiorari petition to the
15 Supreme Court expired. *See United States v. Garcia*, 210 F.3d 1058, 1059-60 (9th
16 Cir. 2000). This statute of limitations ran on May 17, 2005. (Ct. Rec. 66).
17 Amended pleadings that relate back, or arise out of the same "conduct, transaction,
18 or occurrence" as the original pleadings are permitted after the statute of
19 limitations has run. Fed. R. Civ. P. 15(c)(2). Relation back depends on the
20 existence of a common core of operative facts uniting the original and newly
21 asserted claims. *Mayle v. Felix*, 125 S. Ct. 2562, 2572 (2005).

22 In Defendant's original § 2255 motion (Ct. Rec. 60), he alleged that the
23 mandatory sentencing used in his case was unconstitutional under *United States v.*
24 *Booker*, 543 U.S. 220, 221 (2005). The first of his present claims (Ct. Rec. 73)
25 restates this same argument under *Booker* and is therefore clearly within *Mayle's*
26 relation back requirement. His second claim (Ct. Recs. 74 & 75) alleges a
27 Constitutional violation under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
28

1 While this claim uses separate Supreme Court authority, it stems from the same
2 common core of operative facts as the original *Booker* claim. Both claims
3 originate in Defendant's objection to his sentencing factors. His third claim (Ct.
4 Recs. 74 & 75), alleging ineffective assistance of counsel, hinges entirely on the
5 validity of his second *Apprendi* claim and will be considered analagous. All three
6 claims fall squarely within the Fed. R. Civ. P. (15)(c) requirement regarding
7 relation back, and will not be barred by the Court on procedural grounds.

8 **FACTUAL BACKGROUND**

9 Defendant is currently incarcerated at the United States Penitentiary in
10 Atwater, California. A grand jury indicted Defendant on April 23, 2003, for
11 Attempted Manufacture of Methamphetamine, in violation of 21 U.S.C. §§
12 841(a)(1) and 846 (Count 1), and Endangering Human Life While Attempting to
13 Illegally Manufacture a Controlled Substance, in violation of 21 U.S.C. § 858
14 (Count 2)(Ct. Rec. 1). On November 5, 2002, a jury found Defendant guilty on
15 both counts (Ct. Rec. 33). The Court found there were trace amounts of
16 methamphetamine on the scene and applied 21 U.S.C. § 841(b)(1)(C) penalties for
17 his violation of § 841(a)(1). Section 841(b)(1)(C) carries a standard 20-year
18 maximum, which extends to 30 years "if any person commits such a violation after
19 a felony drug offense has become final." On October 4, 2002, the United States
20 filed an Information to Establish a Prior Conviction for Defendant's prior felony
21 drug offense. (Ct. Rec. 14). Therefore, the Defendant's conviction for Count 1
22 carries a statutory maximum of thirty (30) years. On February 10, 2003, this Court
23 sentenced Defendant to a 262 month term of incarceration. (Ct. Rec. 41).
24 Defendant appealed his conviction and sentence, and the conviction and sentence
25 were affirmed by the Ninth Circuit Court of Appeals.

27 **STANDARD OF REVIEW**

1 Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set
2 aside, or correct his or her sentence on the grounds that (1) the sentence was
3 imposed in violation of the Constitution or laws of the United States; (2) the court
4 was without jurisdiction to impose such sentence; or (3) the sentence was in excess
5 of the maximum authorized by law. Pursuant to Rule 4(b) of the Rules–Section
6 2255 Proceedings, the Court may, *sua sponte*, dismiss the motion if “it plainly
7 appears from the face of the motion, any attached exhibits, and the record of the
8 prior proceeding that the movant is not entitled to relief.”
9

10 DISCUSSION

11 Defendant asserts three grounds on which he claims to be incarcerated in
12 violation of the U.S. Constitution: (1) violation of *Booker*; (2) violation of
13 *Apprendi*, and (3) ineffective assistance of counsel for failure to raise the *Apprendi*
14 violation on appeal. This Court finds that Defendant is not entitled to relief on any
15 of these three claims, and therefore, dismisses his § 2255 Petition.

16 1. Violation of *Booker*

17 Defendant asserts that by mandatorily applying the Federal Sentencing
18 Guidelines, this Court violated his Constitutional Rights.

19 The Sixth Amendment requires that in criminal proceedings, any fact that
20 increases the penalty for a crime beyond the statutory maximum, other than a prior
21 conviction, must be submitted to a jury and proved beyond a reasonable doubt.
22 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). “Statutory maximum” means
23 the maximum sentence a judge may impose solely on the basis of the facts
24 reflected in the jury verdict or admitted by the defendant. *Blakely v. Washington*,
25 542 U.S. 296, 303 (2004). In *United States v. Booker*, 543 U.S. 220, 221 (2005),
26 the Court held that in order to place the Federal Sentencing Guidelines in
27 compliance with *Blakely*’s Sixth Amendment standards, they must be advisory
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1 rather than mandatory. *Booker's* holding does not apply retroactively to Sixth
2 Amendment claims by criminals who received mandatory sentences under the
3 Federal Sentencing Guidelines. *United States v. Cruz*, 423 F.3d 1119, 1119 (9th
4 Cir. 2005).

5 Defendant's motion hinges entirely on whether *Booker's* 2005 holding can
6 be applied retroactively to a 2002 conviction. The Ninth Circuit has squarely
7 affirmed that *Booker's* holding is not to be applied retroactively. *Cruz*, 423 F.3d at
8 1119. In compliance with the mandate of the Ninth Circuit, the Court dismisses
9 Defendant's *Booker* claim.

10 **2. Violation of *Apprendi***

11 Defendant asserts that his Sixth Amendment rights, as interpreted by
12 *Apprendi*, were violated when facts not mentioned in the Indictment, submitted to
13 the jury, or proven beyond a reasonable doubt, namely drug quantities and prior
14 criminal history, were used to increase his sentence beyond the statutory
15 maximum.

16 The Sixth Amendment requires that in criminal proceedings, any fact that
17 increases the penalty for a crime beyond the statutory maximum, other than a prior
18 conviction, must be submitted to a jury and proved beyond a reasonable doubt.
19 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (where a defendant's firearm
20 conviction carried a statutory maximum of 10 years, but was sentenced to 12 years
21 because the judge found by a preponderance of the evidence that he was guilty of a
22 hate crime). 21 U.S.C. § 841(b)(1)(C) contains the base penalty for violations of §
23 841(a)(1), and may be applied without a jury determination of drug quantity.
24 *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004). Section
25 841(b)(1)(C) carries a statutory maximum of thirty (30) years imprisonment when
26 a prior felony drug offense has become final.
27
28

1 Following the jury's conviction of Defendant for Count 1 (under 21 U.S.C. §
2 841(a)(1)), the Court applied the penalties pursuant to 21 U.S.C. § 841(b)(1)(C).
3 This was a correct application of § 841(b)(1)(C) because only trace amounts of
4 methamphetamine were found. *Alvarez*, 358 F.3d at 1211. In light of Defendant's
5 prior felony drug conviction (Ct. Rec. 14), this Court concluded that the statutory
6 maximum for Count 1 under § 841(b)(1)(C) was thirty (30) years. The 262 month
7 sentence Defendant received is less than the thirty (30) year statutory maximum,
8 and therefore, does not constitute a violation of *Apprendi*.

9 Defendant also contends that his prior criminal history was applied in
10 violation of *Apprendi*. However *Apprendi*'s holding does not apply to the use of
11 prior convictions in sentencing. *Apprendi*, 530 U.S. at 490. As a result, the Court
12 dismisses Defendant's § 2255 claim for violation of *Apprendi*.

13
14 **3. Ineffective Assistance of Counsel for Failure to Raise *Apprendi***
15 **Violation on Appeal**

16 Defendant asserts that in failing to assert an *Apprendi* violation on appeal,
17 his Sixth Amendment right to effective assistance of counsel was violated.

18 The Sixth Amendment of the United States Constitution guarantees the right
19 of defendants to effective assistance of counsel. U.S. Const. amend. VI; *United*
20 *States v. Shwayder*, 312 F.3d 1109, 1117 (9th Cir. 2002). To show a deprivation of
21 the Sixth Amendment right to counsel, a defendant must establish both that his
22 lawyer's performance was deficient and that the deficient performance prejudiced
23 his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Mancuso v.*
24 *Olivarez*, 292 F.3d 939, 953-54 (9th Cir. 2002). A deficient performance
25 prejudices a defense if there is "a reasonable probability that, but for counsel's
26 unprofessional errors, the result of the proceeding would have been different." *Id.*
27 at 694. A defendant is not prejudiced in regard to inefficient assistance of counsel
28 by an appellate counsel's failure to raise on appeal claims that lacked merit. *See*

1 *Strickland*, 466 U.S. at 689. Even where an *Apprendi* violation has occurred at the
2 trial level, the error Defendant alleges is not one that could be corrected by the
3 appellate court because it does not "seriously effect the fairness, integrity, or public
4 reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 633
5 (2002).

6 This Court has already established that Defendant's *Apprendi* claim has no
7 merit. *Supra*. Even if an *Apprendi* violation had occurred at the trial level in this
8 case, it is not an error that could be corrected at the appellate level, and as a result,
9 his attorney's failure to raise the issue on appeal did not prejudice Defendant.
10 *Cotton*, 535 U.S. at 633. Defendant's ineffective assistance of counsel claim
11 clearly does not meet the requirements of *Strickland* and is, therefore, dismissed.
12

13 Having reviewed the record and been fully advised in this matter, **IT IS**
14 **HEREBY ORDERED:**

15 1. Defendant's 28 U.S.C. § 2255 Petition to Vacate, Set Aside, or
16 Correct Sentence by a Person in Federal Custody (Ct. Recs. 60, 73, 74, & 75) is
17 **DISMISSED.**

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
19 Order and forward copies to counsel and Petitioner.

20 **DATED** this 26th day of April, 2006.

21
22 *s/ Robert H. Whaley*

23 ROBERT H. WHALEY
24 Chief United States District Judge

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